***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

ORIGINAL

# 75-7037

To be argued by:
ARTHUR D. SPATT

## United States Court of Appeals

**For the Second Circuit.**

AUDREY WEINER, AS ADMINISTRATRIX OF THE ESTATE OF JULIE A. WEINER, Deceased,
Plaintiff-Appellant-Appellee,

-v-

BARBARA WEINER, LOUIS B. WEINER, BARRY STONE, JANE STONE, GREYHOUND BUS LINES, INC., and RONALD BROWN,
Defendants-Appellees-Appellants.

*Appeal from the United States District Court for the Eastern District of New York*

# Appellant's Brief

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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AUDREY WEINER, as Administratrix of the Estate of JULIE A. WEINER, deceased,

Plaintiff-Appellant-Appellee,

-v-

BARBARA WEINER, LOUIS B. WEINER, BARRY STONE, JANE STONE, GREYHOUND BUS LINES, INC., and RONALD BROWN,

Defendants-Appellees-Appellants.

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Dated: New York, N.Y.
October 15, 1975

Yours, etc.,

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## STATEMENT OF FACTS

JULIE WEINER was ten years old - a very bright, pretty, talented child - on March 7, 1971 when she set out with her parents and brother from their home in New Jersey, in the family car, destination Killington, Vermont, and a ski vacation. JULIE never got there. She died instead, and it was to decide who was responsible for her death that the trial below was held.

JULIE'S mother, BARBARA, was driving the car east on Route 149 at about 5 P.M. It wasn't snowing then, although there had been some earlier that day. It was still light out and the visibility was good.

The WEINER car came to Ox Bow Hill, still on Route 149 and began its 800 foot descent. The narrow roadway - only one ten foot wide lane in each direction - curved to the left. A double yellow line separated the two lanes. Prior snowfalls had left quantities of slush along the four foot wide shoulders that line both sides of the roadway. There were patches of slush on the roadway itself.

Behind the WEINER car, BARRY AND JANET (sued herein as "JANE") STONE were heading back to their home in Vermont.

Coming up Ox Bow Hill, a chartered Greyhound bus operated by RONALD BROWN was carrying its group of skiers home from Killington.

While in the curve at a speed of about 40 miles per hour, BARBARA WE[illegible]rove her car off the road to the right shoulder where it hit [illegible]guardrail and mound of slush. It then came back into the east bound lane and, on a diagonal angle, crossed the double yellow line and went into the westbound lane where it sheered off the front of the bus. It then collided with the passing STONE car.

JULIE died.

The surviving WEINERS were all seriously injured, and both parents claimed to have suffered amnesia as to the happening of the accident. Another child, who was in the back seat with his sister, stated he did not know how the accident occurred.

BARRY STONE, who was in the best position to observe the accident, could give no reason for the WEINER'S car leaving the roadway and going onto the shoulder, but felt that once it was on the shoulder it got caught in the slush thereat and lost control.

RONALD BROWN confirmed that the WEINER car went onto the shoulder and then hit the guardrail and came back across the highway and into his bus.

## STATEMENT OF PROCEEDINGS BELOW:

The action was brought in the United States District Court for the Eastern District of New York, and came on for trial on September 27, 1974, before Judge John F. Dooling, Jr. and a jury.

Prior to the trial, the first and second causes of action on behalf of plaintiff ALAN VANCE WEINER were discontinued for lack of jurisdiction in the Federal forum. Plaintiff's action on behalf of the estate of JULIE A. WEINER continued, and at the close of plaintiff's case the third cause of action for conscious pain and suffering was withdrawn.

At this time, despite conflicting testimony by defendant BROWN as to his observations and actions at the time of the accident, the Trial Court dismissed the complaints as to defendants GREYHOUND, BROWN and the STONES. Plaintiff then, with the Court's permission, voluntarily discontinued the action against defendant LOUIS B. WEINER and the case was submitted to the jury on the issue of the negligence of defendant BARBARA WEINER severally, and the issue of damages.

A jury verdict was returned in defendant's favor on October 3, 1974.

A written motion was made to set aside the verdict on the grounds that it was contrary to the weight of the evidence, that the dismissal of the complaint as to defendants GREYHOUND and BROWN was erroneous, that erroneous, prejudicial evidence was admitted as to the "interest" of defendant BARBARA WEINER in the outcome of the trial, and material errors in the charge as to the degree of proof in a death action and the right of the estate to maintain the action. The motion also asked for a mistrial on the basis of defense counsel's improper and prejudicial summation.

By his decision dated December 20, 1974, Judge Dooling denied the motion in all respects. This appeal is taken from the judgment entered on the verdict, and the order denying the motion to set the verdict aside, and each and every part thereof.

The prosecution of this appeal has been plagued by problems not of the plaintiff's making. The transcript was ordered and not delivered until some seven and one-half months later, after the appeal was dismissed.

In granting plaintiff's motion to restore, this Court cut the time to file the main brief.

The quality of the transcript is abominable and is unintelligible at significant points in the trial. Complaints to

the Trial Judge, the Chief Court Reporter and Chief Judge of the Court produce the reply that the system is defective and delays and poor quality are, therefore, condoned of necessity.

How unfortunate it is that all of the parties to this appeal must be bound by a record as deplorable as this one.

STATEMENT OF ISSUES TO BE REVIEWED:

The issues to be decided on this appeal are as follows:

1. The propriety of the dismissal of the complaint as to defendant GREYHOUND BUS LINES, INC., on the ground that issues of fact as to negligence were elicited requiring submission of the cause of action to the jury.

2. The jury verdict in favor of defendant BARBARA WEINER was against the weight of the credible evidence, and should have been set aside.

3. Admission of improper, irrelevant and immaterial evidence that defendant BARBARA WEINER would "profit from her own wrong", and the prejudicial and inflammatory comments and summation of counsel for defendant BARBARA WEINER on this same theme.

4. The trial court erroneously failed to charge the "Death Action" charge and to charge the jury of plaintiff's right to maintain the action against defendant BARBARA WEINER; and included an erroneous charge as to foreseeability.

holding that a prima facie case is made out

## POINT I

## THE DISMISSAL OF THE COMPLAINT AGAINST DEFENDANT GREYHOUND WAS ERRONEOUS:

At the close of the plaintiff's case, the Trial Court improperly withdrew from the consideration of the jury the issue of liability on the part of defendants GREYHOUND and BROWN for the occurrence of this tragic accident. It is respectfully submitted that the dismissal of the complaint as to these defendants was improper in that (1) substantial evidence was adduced as to the negligence of the bus driver, (2) the driver, an interested witness as a matter of law, gave inconsistent testimony which put his credibility in issue and (3) the driver's testimony was contradicted on a material point by the testimony of another witness.

### 1. Speed

Defendant GREYHOUND, through its driver BROWN, testified that as he approached the area where the accident took place, he was traveling at speeds, the estimates of which varied at differing times in the testimony, of 30, 35 or 40 miles per hour. (Transcript, Brown, pp. 26*). His bus, which was approximately eight feet wide was traveling in the westbound lane, which was approximately ten feet wide. Transcript, Brown, p. 17). It was not snowing at the

*References throughout this Brief are to the transcript and not the appendix.

time of the accident, and his visibility was good.

(Transcript, Brown p. 20-21)

2. Position When Saw Danger

The defendant BROWN was then asked the relative positions of the bus and WEINER car when he first saw the car.

> "Q. Mr. Brown, when you first saw the Weiner car, were you going downhill, were you going uphill or were you on a steady level grade?
>
> A. I believe I was going on a downgrade.
>
> Q. And how far away from the Weiner car were you when you first saw her, Mr. Brown?
>
> A. I don't know, sir.
>
> Q. Mr. Brown, November of 1971, were you asked this question at the Motor Vehicle Hearing -- and by the way, were you under oath at that time, Mr. Brown?
>
> A. Yes, sir.
>
> Q. Page 8, "When you first saw her vehicle how much distance was there between the two of you?
>
> A. It is hard to say. I would say roughly 800 feet."
>
> Q. Did you testify to that effect at the Motor Vehicle Bureau, yes or no, sir?
>
> A. Yes sir.

Q. You remember saying that, don't you, Mr. Brown?

A. Apparently I didn't take the question as what it was said -- it was 800 feet from the top of the hill to the point of impact.

Q. So in other words when you answered this question which the Motor Vehicle Referee put to you, not any of the lawyers but the Referee, he asked you a question "When you first saw her vehicle how much distance was there between the two of you?"

"Answer: It is hard to say, I would say roughly 800 feet."

You now tell this Court and jury that you meant that it was 800 feet to the top of the hill; is that correct?

A. That's the way I took the question at the time, sir.

Q. Did you see the Weiner car pull off the right and go off the road and hit a guard rail?

A. Yes sir.

Q. Was that an indication to you that there was danger?

A. Yes sir.

Q. How far away were you from the Weiner car when you saw the car pull off the road and hit the guard rail?

A. Approximately 225 feet.

Q. And if I may just repeat this with your Honor's permission -- that was the danger signal when you saw the car pull off the road and hit the guard rail; is that correct?

A. Yes sir, that was my best estimate.

Q. But that was the danger, the danger was when you saw the car pull off the road and hit the guard rail; is that correct:

A. Yes sir.

Q. Where was the Weiner car with regard to the top of the hill when you saw the Weiner car in danger?

A. I don't think I can answer that. I don't remember.

Q. You testified that your impression is that it was 800 feet from the point of impact to the top of the hill; is that correct?

A. Yes sir.

Q. And where between the bottom of the hill and the place where the impact occurred, and the top of the hill did the Weiner car go off the road; near the top of the hill, in the middle, the bottom, where in that area?

A. I don't know, sir. I'm not familiar with that.

Q. Now, is there an entry on this report which states in printing "Location on roadway when danger noticed", take a look at that and see if there is an entry "Location on roadway when danger noticed."

A. Yes, there is.

Q. That's the regular form of the Greyhound Company; is it?

A. Yes.

Q. And does it have an entry where the bus was when the danger was noticed and where the other car, the Weiner car was when the danger was noticed? Does it have that down on that report?

A. Yes sir, it does.

Q. Where was the bus, your bus when the danger was noticed according to that report by the Greyhound Company signed by you?

A. The bus was in the driving lane, traveling west.

Q. And where was the Weiner car? Where was the Weiner car when you were in your lane traveling west? Where was the Weiner car when you first noticed the danger?

MR. CAMERON: Your Honor, I object.

THE COURT: As I understand the question called for in the form -- in other words, what is the question in the form and what the answer is all you're being asked at this point, Mr. Brown.

THE WITNESS: Location of the other vehicle, top of the hill.

Q. So according to that --

THE COURT: What the heading on that?

THE WITNESS: Location in roadway when danger noticed.

Q. So when danger was noticed in regard to the Weiner car, according to that report, the Weiner car was on top of the hill and you were on the bottom; is that correct; according to that report?

A. According to the report.

Q. And that distance you have told us was 800 feet approximately; is that correct?

A. Yes sir." (Transcript, Brown, p. 27-31)

3. Action When Danger Observed

BROWN was then asked what he did with respect to the operation of his vehicle:

"A. I immediately applied the brakes, pulled the bus over to the right side of the road as far as I could go.

Q. When you saw danger, you applied your brakes and pulled your bus over to the right side of the road, as far as you can go; is that right?

A. That's correct.

Q. Danger we know is when the Weiner car went off the road; is that correct?

MR. LEVITT: That's been asked and answered too, three times.

THE COURT: He already told us that, yes.

Q. Now, did you apply the brakes from that point right up until the time of impact?

A. That's correct.

Q. When you moved to your right, did the bus respond to the wheel?

A. Yes sir.

Q. And when you moved it to the right did you move your wheel sharply to the right, gradually to the right, how did you do that?

A. I pulled the bus over (indicating) to the right-hand side of the road just as far as I could to get out of the way of the accident.

Q. You pulled o er to the right-hand side of the road, Mr. Brown?

A. Yes sir.

Q. Not the shoulder, sir?

A. On the shoulder. I was already on the right-hand side of the road." (Transcript, Brown, p. 31-32)

This claim of moving to the right is disputed by the testimony of defendant JANET STONE, who stated that as she observed the happening of the accident, the bus did not swerve to the right. (Transcript, Stone, p. 28)

4. Location When Car Crossed Center Line

Defendant BROWN was asked to locate the point at which the Weiner car crossed the center line into his lane, and was confronted with the variance in his testimony from a prior examination:

"Q. Now, at a point when the Weiner car crossed the center line on its way across the entire road, how far away was your bus from the Weiner car?

A. Approximately 150, 200 feet would be my best guess.

Q. In your examination before trial which took place in August, 1972, on page 11 were you asked this question and did you give this answer:

'Question: When the other car got into the center portion of the roadway just before it crossed over into your portion, where was your bus, how far from the car at that time?

Answer: Approximately 200 feet.'

Did you give that answer to that question under oath at this deposition?

A. Yes sir.

Q. And now you tell this Court and jury that it was approximately 150 feet to 200 feet; is that correct?

A. That's correct.

Q. Did you discuss your testimony with your lawyer before you got on the stand?

A. Did I discuss what I'm going to say here?

Q. Yes.

A. I'm using my own words. We discussed --

Q. I know that sir. Did you talk with your lawyer? Did you go over your questions and answers that were likely to be asked of you when you got on the witness stand?

A. Somewhat.

Q. Did you go over that particular answer, Mr. Brown, how far away that Weiner car was from the bus when it crossed the center line on its way in your lane? Did you go over that particular

question and answer?

A. Yes sir." (Transcript, Brown, p. 34-35)

Later on, BROWN was asked the distance his bus moved from the time he applied his brakes, until the impact. At the trial he testified his bus traveled approximately sixty feet. (Transcript, Brown, p. 36) That this was at variance with his prior sworn testimony at an examination before trial which was pointed out to him, and the witness was permitted to attempt to explain to the Court and jury the reason for the variation in his testimony. (Transcript, Brown, p. 36-37)

5. Position of Bus At Impact

As to the position of his bus at the time of impact, BROWN testified that the left side of his bus was approximately four feet from the center line on his side of the roadway. Again, this was at variance with his prior testimony at the examination before trial. (Transcript, Brown, p. 48) Significantly, the figure mentioned in the earlier testimony is consistent with the diagram of the position of the vehicles at the scene of the accident first drawn by the investigating police officer. (Plaintiff's Exhibit No. 2).

These Inconsistencies Are Of A Material Nature And For the Jury.

These inconsistencies were all on important points material to the issue of negligence on the part of the party defendant. Most basic to the determination of fault on the part of this defendant was the evidence of the speed of the bus, the proximity of the bus to the center line and shoulder, the position of the vehicle after the accident, and where the bus was when the Weiner car first got into trouble.

Yet after the close of plaintiff's case, the Trial Court dismissed the complaint as to these defendants. This was after vociferous argument by counsel for plaintiff ESTATE and defendants WEINER. (Transcript, pp. 91-116) in which each of these points was raised. Each argument of counsel was rebuffed by the Court, which indicated its displeasure with the lawyer's "interpretation of the evidence":

> COURT: "I'm afraid I can't accept your interpretation of the evidence. . ." (Transcript, p. 100)
>
> COURT: "I'm afraid I do not -- cannot and will not accept that as being a correct reading of the man's testimony. . ." (p. 102)

> COURT: "Please do not read that to me again, you are misreading it. That is not what it significantly means. . ." (p. 105)

Implicit in all of this, of course, is the Trial Court's own appraisal of the credibility of this interested witness, and its own ascription to it of quality and weight.

This was a jury trial, and the role and purpose of the jury in our system of jurisprudence is fully defined. BROWN here was interested, as a matter of law. The jury was responsible for the evaluation of his testimony, and the allocation of weight and quality in the measure they saw fit.

> "Only a jury is endowed with the right to pass on conflicting evidence as well as the credibility of the witness." (SWENSSON v. N.Y. ALBANY DISPATCH, 309 N.Y. 497, 131 N.E. 2d 902, citing Piowarsky v. Cornweh, 273 N.Y. 226, 229.)

Assuming, arguendo, that what BROWN said was true, even then the jury would not be bound to accept it, although it was not otherwise contradicted or impeached. (Harris v. Fifth Avenue Coach, Inc., 132 N.Y.S. 2d 743). And yet, BROWN himself supplied the contradiction, as did the police officer's first diagram, and the testimony of a co-defendant.

A case very similar in fact to the instant case is Andersen v. Bee Line, Inc., 1 N.Y. 2d 169, 151 N.Y.S. 2d 633 (Court of Appeals, 1956).

In Andersen, plaintiff's decedent was the operator of a car traveling on a 30' wide, 2-way, curving roadway. The car collided head-on with a bus coming from the opposite direction. The bus driver defendant there did not give inconsistent testimony, but testified as to no fault on his part. An independent non-party witness testified as to the negligent operation of the bus.

A verdict was rendered in plaintiff's favor; on appeal, the Appellate Division reversed and dismissed the complaint. The Court of Appeals reinstated the complaint and judgment of the trial court, declaring that the jury had the right to infer negligent operation from the evidence presented by the witness, or the jury could accept or reject that witness' testimony. It was for the jury!

On review of the dismissal of a complaint, the Court must view the evidence adduced at trial in its aspect most favorable to the plaintiff, and the plaintiff is entitled to the benefit of every reasonable inference which can reasonably be drawn from the evidence. (Andersen v. Bee Line, Inc., supra;

Saqorsky & Son v. Malyon, 307 N.Y. 584, 586, 123 N.E. 2d 79; De Wald v. Seidenberg, 297 N.Y. 335, 336-337, 79 N.E. 2d 430, 431)

The dismissal of the complaint should be reversed, the complaint reinstated and a new trial directed in the interests of justice.

## POINT II

THE JURY VERDICT IN FAVOR OF DEFENDANT BARBARA WEINER WAS AGAINST THE WEIGHT OF THE CREDIBLE EVIDENCE AND SHOULD HAVE BEEN SET ASIDE.

The Law of Pfaffenbach

It is respectfully submitted that the verdict in favor of defendant BARBARA WEINER is contrary to the rule of law set forth in Pfaffenbach v. White Plains Express Corp., 17 N.Y. 2d 132, 269 N.Y.S. 2d 115. There, the Court of Appeals held that showing defendant's vehicle crossed to the wrong side of the road, and nothing more, made out a prima facie case sufficient to go to the jury on the question of liability.

The Evidence Herein

In the instant case, evidence was presented of two deviate movements by the WEINER vehicle. According to the testimony of defendant BROWN (Transcript, Brown, p. 27-34) and defendant BARRY STONE (Transcript, Stone p. 135, 150) firstly, the car went off the travel portion or paved portion of the road, onto the adjacent shoulder, into the guard rail and secondly, back across the roadway and double yellow line into the oncoming lane of traffic.

In holding that a prima facie case is made out on facts such as above, the Court of Appeals has ruled, by definition, that these facts alone constitute evidence that will "suffice until contradicted and overcome by other evidence" (Black's Law Dictionary, Revised 4th Ed., 1968, p. 1353).

In this case, there has been no evidence offered by the defendant WEINER to overcome the operation of Pfaffenbach's law. It is incumbent upon the defendant, and not the plaintiff, to come forward with an explanation of what happened in the WEINER car (Whitely v. Lobue, 59 Misc. 2d 755, rev'd 30 A.D. 2d 552, rev'd 24 N.Y. 2d 896).

The defendants in this case claimed lack of memory as to the events surrounding the accident. Defendant did not offer any medical proof to substantiate this claim. There was no substantive proof presented to explain why the WEINER car went off the road, or across it.

It follows, deductively, that the jury's verdict for the defendant -- if in fact based on evidence as to the actions of the car and bus and road condition, and not on prejudicial evidence and summation of defendant's counsel (see POINT III) -- was a verdict based on speculation or

conjecture. This is an improper exercise of the jury function, for verdicts must be based on the evidence or the inferences to be naturally and logically drawn therefrom. If the jury believed the evidence which constitutes prima facie proof under Pfaffenbach, and found there was no conflicting evidence forthcoming from the defendant, the jury would have to come up with a finding of negligence (Lomer v. Meeker, 25 N.Y. 361; Coppo v. Coppo, 163 Misc. 249, 297 N.Y.S. 744) and return a verdict for the plaintiff.

Motion To Set Aside Verdict

On the motion to set aside the verdict, the Court was required to assess the evidence in the light most favorable to plaintiff and to give plaintiff the benefit of every favorable inference which might reasonably be drawn (supra; also, Farber v. City of New York, 213 N.Y. 411, 414, 107 N.E. 756).

Had the Court done this, the verdict -- based on unrefuted evidence -- would have to be reversed.

The verdict is against the weight of the credible evidence. The rule is that where the evidence so preponderates in favor of the plaintiff that the jury could not have reached its conclusion on any fair interpretation

of the evidence, the verdict must be set aside.(Emphasis added) (Flynn v. City of New York, 316 N.Y.S. 2d 494).

In this case, under the law of Pfaffenbach, and its progeny Coury v. Safe Auto Sales, Inc., 32 N.Y. 2d 162, 344 N.Y.S. 2d 347, Lewis v. Rivers, 41 A.D. 2d 657, 340 N.Y.S. 2d 975, Schmoll v. Luther, 370 N.Y.S. 2d 975, and Czekala v. Meehan, 27 A.D. 2d 565, aff'd 20 N.Y. 2d 685, 282 N.Y.S. 2d 352, the verdict is against the weight of the credible evidence and the law as to the sole issue of whether there was any negligence on the part of the defendant BARBARA WEINER, and whether that negligence was the proximate cause of the accident which took the life of this child. Under the law, if there was any negligence of this type -- and certainly the evidence recited so far has presented facts from which such negligence can be inferred, then there must be a verdict for the plaintiff.

Here, a car drove off the road onto a shoulder, hit a guard rail and then crossed double yellow lines onto the wrong side of the road, and this jury incredibly decided that there was no negligence whatsoever in the operation of the car. We know why.

It is respectfully submitted that in view of the

evidence adduced in this case, and the applicable law, the verdict of the jury was based on some consideration extraneous to the proof and argument and law on negligence and liability. It is submitted that one fact - one theme that permeated the trial - kept the jury from rendering a plaintiff's verdict, and that was the evidence and comments of counsel that defendant BARBARA WEINER, the mother-driver, should not profit by her own wrong.

In its decision (p. 7, 8), the Court rationalizes



## POINT III

ADMISSION OF EVIDENCE AND COMMENT BY COUNSEL THAT DEFENDANT BARBARA WEINER WOULD "PROFIT FROM HER OWN WRONG" WAS PREJUDICIAL

> "But (defense counsel) did transgress the instruction in spirit if not literally, in effect asking the jury to agree with him that they would not themselves have been callous and immoral enough to seek a money recovery for a deceased child of their own by contending that their own negligence had encompassed the child's death. It can be said only that, literally, (defense counsel) did not argue to the jury that they ought not to return a verdict for the plaintiff-administratrix because they would not themselves have sued had they been in the same position since they doubtless shared his view of the humanity and morality of the situation." (Words in parenthesis added) (Decision, Judge Dooling, p. 15).

The jury verdict in favor of defendant BARBARA WEINER was a verdict of passion and prejudice, caused by the unfair and wholly improper admission of evidence as to her "interest" in the monetary outcome of the action, and comment by her own attorney in summation. The effect of these is a gross miscarriage of justice that must be rectified.

The duty of every juror is to apply the law, and the

law of the State of New York is clear and unequivocal: despite his own negligence, a tortfeasor who causes the death of another may still be a beneficiary in the estate, including the proceeds arising from the wrongful death action. This remains true even if the tortfeasor is the sole beneficiary. (Estates, Powers and Trusts Law, 5-4.4; McKay v. Syracuse Rapid Transit Ry. Co., 208 N.Y. 359, 101 N.E. 885; Jenks v. Veeder Contracting Co., Inc., 264 App. Div. 979, 37 N.Y.S. 2d 230; Rozewski v. Rozewski, 181 Misc. 793, 46 N.Y.S. 2d 743; Rischer v. Owens, 8 Misc. 2d 1036, 171 N.Y.S. 2d 463; Matter of Minetti, 65 Misc. 2d 1011, 319 N.Y.S. 2d 56; Lamoree v. Binghampton Hospital, 68 Misc. 2d 1051).

Her own lawyer was permitted to question defendant BARBARA WEINER:

> "Do you know that if a judgment is rendered against you, you will collect 50% of the judgment?"
>
> "Do you say Mrs. Weiner that you were never aware until his Honor made that statement, you were never aware that if the suit was successful against you, that is, if you were found negligent, that you were never aware that you and your husband would get the money?" (Transcript, Sept. 27, p. 202)

The theory of the admission of such evidence was in order to show the alleged interest of this party in the outcome of litigation, so that on the question of liability -- not damages -- the jury could evaluate whatever evidence this witness presented on that issue alone. This witness did not testify at all on the issue of damages. Defendant's "interest" was material and relevant to the jury's assessment of the claim of amnesia and the resulting failure to offer an explanation of why the accident occurred. (See Court's comment, transcript Sept. 27, p. 153; decision, p. 15)

Defense counsel was explicitly cautioned by the Court to tread carefully, and was expressly told not to suggest -- in cross-examination or summation -- that an action could not be maintained because of the tortfeasor-beneficiary relationship enjoyed by this defendant (transcript, Sept. 27, p. 153-154, and pps. A16, A17).

The jury was obliged to determine, (1) who was at fault for this tragedy, and (2) upon finding negligence, assess the amount of damages. And yet, defense counsel saw fit to tell the jury:

> "We now have the estate of Julie Weiner suing and charging negligence. She (the dead girl) looks at her mother, or Barbara Weiner, who was the mother, points her finger and says, 'You were negligent.'" (Transcript, Zawacki summation, p. 5)

> "If a verdict were rendered in this case the question is, who gets the money. It is not a mystery. It doesn't go to the American Cancer Society, or the Red Cross. It goes to the parents - no ifs, and, or buts. It doesn't go to the boy Alan.
>
> So, these are all considerations for you to think about and talk about." (Transcript, Zawacki summation, p. 11-12)

Clearly, these were not considerations that the jury was to think and talk about. The matter of WHO was the beneficiary of any monetary recovery was a totally extraneous matter, introduced by counsel to seduce the jury into ignoring the evidence of liability and turn the <u>parents</u> -- not the plaintiff -- out of court because they should not profit from their wrong.

> "In this case -- and I'm glad Greyhound is gone now and Mr. Stone is gone because it makes the issue much clearer because it removes some of the diversions in the case -- in this case, the only way there can be a money verdict is if Mrs. Weiner caused the death of her daughter; if she was negligent and did something wrong. If so, and you so find, then there shall be a money verdict and as I said, who gets the money? Mrs. Weiner and Mr. Weiner, both parents." (Transcript, Zawacki summation, p. 12)

The Courts of this State have uniformly condemned the practice of attorneys using summation to interject extraneous issues into a case for the purpose of influencing a jury. The final comments of defendant's counsel were perhaps the most damaging and prejudicial of all:

> ". . .This is not Alan's case. If a money award is made it goes to the parents. They have chosen to do it and I leave you with this one thought and I'm going to sit down. I am silenced forever and the case will be in your hands.
>
> The one thought is this: If you put yourself in the place of the Weiners here driving a car on this road with your child in it; and accidents happen as happened here and I hate to even think about it but there's a fatality -- I hate to think about it -- I've got children and I assume many of you have -- horrible thing -- but assume it happens. Would you come into court four years later asking some jury to tell you that you were the cause of the child's death so you can get some money for it?" (Transcript, Zawacki summation, p. 27-28) (Emphasis added)

In Kohlmann v. City of New York, 8 A.D. 2d 598, 184 N.Y.S. 2d 357, 358, the Appellate Division, First Department, reversed a judgment and ordered a new trial because of trial tactics of the plaintiff's attorney. The Court held:

> ". . .His conduct appears to have been calculated to influence the jury by considerations which were not legitimately before them, and cannot be dismissed as inadvertent, thoughtless or harmless. Parties to a trial, civil or criminal, have a right to have the case determined on the facts and law applicable thereto. When misconduct of counsel in interrogation or summation so violates the rights of the other party to the litigation that extraneous matters beyond the scope of the trial may have substantially influenced or been determinative of the outcome, such breaches of the rules will not be condoned."

In Cherry Creek Nat. Bank v. Fidelity & Cas. Co. of N. Y., 207 App. Div. 787, 202 N.Y.S. 2d 611, 613, as here, prejudicial remarks were made by counsel during summation. Unlike the instant case, the Court there sought to try to neutralize counsel's conduct. This did not prevent the Appellate Division from reversing the judgment and directing a new trial, stating:

> "The rule allowing counsel when addressing the jury the widest latitude in discussing the evidence and presenting the client's theories falls far short of authorizing the statement by counsel of matter not in evidence, or indulging in argument founded on no proof, or demanding verdicts for purposes other than the just settlement of the matters at issue between the litigants or appealing to prejudice or passion . . .The jurors must determine the issues upon the evidence. Counsel's address should help them to do this, not tend to lead them astray." (Emphasis added)

That the prejudicial effect was a probability did not prohibit the setting aside of a verdict when counsel's actions caused issued to be presented to the jury which were extraneous and created a prejudicial atmosphere. (Tuthill v. DeVries, 265 App. Div. 881, 38 N.Y.S. 2d 75; Weinstein v. Prostkoff, 191 N.Y.S. 2d 322; Passzehl v. Metropolitan Distributors, Inc., 259 App. Div. 1050; 21 N.Y.S. 2d 386; Gutin v. Frank Mascali & Sons, 198 N.Y.S. 2d 504.)

The failure to make objection to comments when made does not bar the Court from acting upon those comments (Gutin v. Mascali, supra). Plaintiff's counsel's failure to move for a mistrial in the instant case, (Decision, p. 15) does not, therefore, present a barrier to this Court's condemnation of counsel's comments.

The real defense in this case, "Don't let her profit by her own wrong", is in direct conflict with the law of the State pertaining to recovery for non-willful torts. Based on the evidence adduced at the trial, and the permissible inferences drawable therefrom, the jury would have returned a verdict for the plaintiff were it not for defendant's thrust. That theme being contary to the law,

and an improper exercise of counsel's right to comment upon the evidence, and an improper application of the evidence adduced, the net effect of all of this was to create a devastatingly prejudicial atmosphere which tainted the jury's evaluation of the evidence on liability and damages. For this reason, the verdict should be set aside and a new trial ordered.

## POINT IV

THE TRIAL COURT ERRONEOUSLY FAILED TO CHARGE THE RIGHT OF THE ESTATE TO SUE: ERRONEOUSLY CHARGED THE MEANING AND APPLICABILITY OF "FORESEEABILITY" AS AN ELEMENT OF NEGLIGENCE HEREIN: ERRONEOUSLY FAILED TO CHARGE THE "DEATH ACTION" CHARGE

By the time of the Charge to the Jury, these triers of the facts had heard: (1) prejudicial evidence concerning the alleged interest of defendant BARBARA WEINER in the monetary outcome of the case; (2) that defendants GREYHOUND, BROWN and the STONES were no longer parties to the action, and finally and significantly, (3) had been exposed to defendant's counsel's stinging summation which culminated in an insidious attack on the morality of the parents of the dead child.

The Trial Court prejudicially and erroneously failed to charge the jury that the plaintiff, Estate of JULIE A. WEINER, had an absolute right to this lawsuit; erroneously included a charge on foreseeability as an element of negligence without fully defining and delineating its meaning; and erroneously failed to charge the so-called "death action" or Noseworthy charge as to proof in a death case. These errors are of such a material nature that

individually, and cumulatively, the interests of justice require a reversal of the judgment herein, and a new trial.

A. THE RIGHT OF THE ESTATE TO SUE

The Trial Court, on the record (Transcript. p.A-17, A-81) and in its decision denying plaintiff's motion to set aside the verdict (decision, p. 10) declined to charge the jury that the estate of the dead girl had an absolute right to sue the driver of the vehicle in which she was riding, even though the driver was the mother and also a beneficiary of the estate, and further that there is no different duty owned to the child passenger, whether a stranger or her own. (Transcript, p. A-81)

It is respectfully submitted that while the Trial Court's rationale for not giving this charge may be technically true -- that all elements in that request may be inferred by the jury inasmuch as they are being charged at all - (A17, decision, p. 10) - said rationale is patently insufficient in view of the prejudice created by the previous course of the trial.

Defense counsel mounted a strong and outspoken - and unquestioningly improper - attack on the morality of the case. An equally strong and forthright statement was

required to offset the prejudice generated by defendant's counsel's remarks. That the plaintiff's lawyer's summation was skillful and effective (decision, p. 15, 16) did not mean, however, that this need was met. The jury expects that in the adversary system, counsel for each side will adopt a partisan position. The only truly impartial force in the courtroom is the Judge, and it is his comments which carry the most weight.

Plaintiff was only requesting a statement of what we know to be the law of this State. The Estates, Powers and Trusts Law has previously been cited, as has case law interpreting the statute. The rationale of the Court, therefore, that it cannot tell the jury what the law is because it would be prejudicial to the defendant's case (decision, p. 10) was an erroneous exercise of judicial discretion. The failure to charge the jury as to this legal right constitutes prejudicial error, and warrants a reversal of the verdict in favor of the defendant.

B. THE COURT'S CHARGE ON THE ELEMENT OF "FORESEEABILITY" AS AN ELEMENT OF NEGLIGENCE WAS IMPROPER AND MISLEADING.

The Trial Court charged the jury:

> ". . .In order to recover, then, plaintiff must bear the burden of proving by a preponderance of the evidence, first, that defendant was negligent, second, that the defendant's negligence created a reasonably foreseeable risk of bodily harm to persons in plaintiff's situation, and third, that defendant's negligence was a substantial factor in bringing about plaintiff's accident and injury. . ." (Transcript, p.A-64)

That the jury was confused by this instruction was evident by the fact that within one hour they were back for a clarification of the charge (Transcript, p. A-86, 87).

The Court then repeated its charge (Transcript, p.A-87, 88) and at that time, plaintiff's counsel requested that the charge be further explained (Transcript, p. A-89) and restated (p. 90). This was done (Transcript, p. 90, 91). It was then that plaintiff's counsel requested that the Court reconsider the charge on the element of foreseeability and withdraw it. The Court refused (Transcript, p. A-93).

The wording of the charge was unclear and misleading to the jury, despite attempts at clarification. The jury could have interpreted the charge to require that the mother-driver knew that she was harming her child before they could reach a verdict in favor of the plaintiff.

Under the facts of this case, which is all the Trial Court and jury were concerned with, the jury could have been permitted to presume reasonable foreseeability.

In addition, at no time did the Court charge the jury on the definition of foreseeability, nor expressly what harm had to be foreseen.

In this regard, the Pattern Jury Charge rounds out the element of foreseeability as to definition and scope:

> ". . .The exact occurrence or precise injury need not have been foreseeable; but injury as a result of negligent conduct must have been not merely possible but probable.
>
> If a reasonably prudent person could not foresee any injury as a result of his conduct, or if his conduct was reasonable in the light of what he could foresee, there is no negligence. Conversely, there is negligence if a reasonably prudent person could foresee injury as a result of his conduct, and his conduct was unreasonable in the light of what he could foresee. (P.J.I. 2:12, p. 131)

It is respectfully submitted that the element of foreseeability should have been deleted due to the facts of this particular case, just as the element of contributory negligence on the part of the plaintiff-decedent was withdrawn. (Transcript, p. A-64). It could have presumed on the facts of this case. Its inclusion served only to confuse the jury and to mislead them.

C. THE FAILURE TO CHARGE THE SO-CALLED "NOSEWORTHY RULE" WAS MATERIAL ERROR AND REQUIRES THAT THE VERDICT BE SET ASIDE

For almost thirty years, since the Court of Appeals of the State of New York enunciated it, the rule of law has been that:

> ". . .in a death case a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence." (Noseworthy v. City of New York, 298 N.Y. 80)

This rule has become basic in all death actions (Andersen v. Bee Line, Inc., 1 N.Y. 2d 169, 151 N.Y.S. 2d 633).

The failure of the Trial Court to charge this lesser degree of proof has been held, in and of itself, to constitute prejudice to the plaintiff's case, and requires the reversal of the judgment (Moses v. Litman, App. Div. 2nd Dept., 265 N.Y.S. 2d 360).

In the instant case, on several occasions (Transcript pps. A-14, A-15a) plaintiff's counsel requested that the Trial Court charge the rule of Noseworthy to the jury. It expressly refused to do so (Transcript, pp. A-14, 15, A-15a).

In its decision (p. 7, 8), the Court rationalizes its refusal to charge. It is not an inference which the Court draws to support its position, but rather is pure speculation. There is no discretion in the Court to decide the facts of the circumstances of the occurrence and then decide whether to charge the lesser degree of proof.

The case law decisions of this State is that the lesser degree of proof in a death case must be charged, and that failure to do so constitutes reversible error.

## CONCLUSION

An innocent child, a passenger in a car that went off the road, died.

In any case of this type, where the deceased was not the daughter of the driver, there would have been a plaintiff's verdict. Despite the fact that the law of the State of New York permits interfamilial lawsuits, and that the law permits a wrongdoer to be the beneficiary of any recovery in a wrongful death action, the plaintiff was turned out of Court.

This resulted because of all of the errors permitted to take place during the trial, and because of errors in the Charge to the jury.

It is the cumulative effect of errors and appeals to passion and prejudice that requires that the verdict of the jury be set aside and a new trial ordered in the interests of justice.

Respectfully submitted,

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ARTHUR D. SPATT,
Of Counsel

STATE OF NEW YORK )
: SS.
COUNTY OF RICHMOND )

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 12 day of August, 1975 deponent served the within Brief upon REILLY & REILLY; SCHWARTZ, LEVITT, SOMMER & BLITZ and JOHN S. ~~X~~ ZACHARY

attorney(s) for Appellees

in this action, at 233 Broadway, NYC 10007, 50 Court St., Brooklyn, N.Y. and 75 Little Clove Rd., Staten Island, N.Y, respectively

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
12 day of August, 1975.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132615
Qualified in Richmond County
Commission Expires March 30, 1976